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No. 01-1501

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

GRAY DAVIS, et al., *Petitioners,*

v.

JOHN ARMSTRONG, et al., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979), the Court decided whether a state parole statute created a due-process right by looking to whether the statute's language was mandatory or discretionary. But later, in *Sandin v. Conner*, 515 U.S. 472 (1995), the Court disapproved that mechanical approach. It held that the proper focus was whether the state had created a right of "real substance"—something that an inmate would have a legitimate claim of entitlement to. Because *Sandin* did not explicitly overrule *Greenholtz*, circuits are split on the proper test for parole cases. Thus, the question presented is:

> Does this Court's test in *Sandin* apply to parole-suitability hearings for state inmates?

LIST OF PARTIES

Petitioners are Gray Davis, Governor of the State of California; Robert Presley, Secretary of the Youth and Adult Correctional Agency, the agency that oversees the California Board of Prison Terms; Carol Daly, Chair of the California Board of Prison Terms; and the California Board of Prison Terms.

Respondents are a class of current and future California state prisoners and parolees with mobility impairments, hearing disabilities, visual disabilities, learning disabilities, or mental retardation.

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OPINION BELOW

The court of appeals' opinion is reported at 275 F.3d 849 (9th Cir. 2001). App. 1a. The district court's findings of fact and conclusions of law, judgment, and permanent injunction are unreported. App. 60a, 151a, and 152a. The district court's revised injunction, entered after remand, is also unreported. App. 166a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment on November 28, 2001. App. 1a. A timely petition for rehearing was filed on December 12, 2001, and denied on January 9, 2002. App. 178a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code section 3041

The text of this provision is provided in Appendix 180a.

STATEMENT OF THE CASE

Respondents are a class of disabled prisoners and parolees who contend that prison and parole policies violate due process, Title II of the Americans with Disabilities Act, and § 504 of the Rehabilitation Act. Specifically, they allege that the policies prevented them from understanding various parole proceedings, or denied them the opportunity to attend required hearings, or wrongfully denied them parole. The Board of Prison Terms conducts parole hearings and revocations.

The respondents alleged wide-ranging statutory and due-process violations regarding almost every aspect of the Board's parole operations. This petition, however, relates only to respondents' due-process rights at parole-consideration hearings for life prisoners. In that regard, the district court found that the Board's policies and procedures violated due process because class members received deficient notice of parole proceedings,

unknowingly waived important rights, and had been subject to unfair procedures. App. 144a-145a.

Petitioners appealed various aspects of the injunction to the Ninth Circuit, which affirmed in part, reversed in part, and remanded in part. In its published opinion, the court of appeals held, as a matter of first impression, that California prisoners have a federally protected liberty interest in parole hearings, because California's statute is sufficiently determinate to require the hearings as a matter of right. *Armstrong v. Davis*, 275 F.3d 849, 864-65 (9th Cir. 2001); App. 25a.

REASONS FOR GRANTING THE WRIT

Whether state prisoners and parolees have federal due-process rights in parole-consideration proceedings is an issue of continuing national importance with significant impact on every state's parole operations. Courts are split on the appropriate test for determining whether such rights exist.

The Seventh, Ninth, and District of Columbia Circuits continue to employ the analytical method that the Court in *Sandin* strongly criticized, and expressly disavowed in the prison context. *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001); *Heidelberg v. Ill. Prisoner Review Bd.*, 163 F.3d 1025 (7th Cir. 1998); *Ellis v. District of Columbia*, 84 F.3d 1413 (D.C. Cir. 1996). The Ninth and District of Columbia Circuits have also stated that, until the Court speaks directly to the issue in a parole context, the *Greenholtz* test will apply.

But the First, Third, and Eighth Circuits apply the *Sandin* test to parole and conditional-release cases. *Asquinth v. Dep't of Corrections*, 186 F.3d 407, 412 (3rd Cir. 1999); *Callendar v. Sioux City Residential Treatment Facility*, 88 F.3d 666 (8th Cir. 1996); *Hamm v. Latessa*, 72 F.3d 947 (1st Cir. 1995). As evidence of the confusion in the circuits, the Fifth Circuit uses a test employing elements of both *Sandin* and *Greenholtz*. *Orellana v. Kyle*, 65 F.3d 29 (5th Cir. 1995).

Unless the Court enunciates a rule, the circuits will continue to fracture and there will be no uniformity. This case presents a timely opportunity for the Court to provide much-needed direction to the circuits on a highly significant constitutional issue, and one which affects the extent of federal judicial intervention into state criminal-justice systems.

I.

HOW STATE-CREATED LIBERTY INTERESTS ARE DETERMINED IN PAROLE PROCEEDINGS AFFECTS CRIMINAL JUSTICE SYSTEMS NATIONALLY BUT HAS NOT BEEN DIRECTLY ADDRESSED BY THIS COURT SINCE IT REPUDIATED THE METHOD USED IN *GREENHOLTZ*.

A. The Court Has Directed Lower Federal Courts to Focus on the Nature of the Liberty Interest Rather Than the Language of the States' Statutes.

As a general rule, inmates have "no constitutional or inherent right . . . to be conditionally released before the expiration of a valid sentence." *Greenholtz*, 442 U.S. 1, 7 (1979). *Greenholtz*, whose underlying rationale has been overturned, found that states may, however, create a liberty a interest in parole. *Greenholtz*, 442 U.S. at 11-12. In deciding whether Nebraska created a liberty interest in parole, the *Greenholtz* Court looked to the language of the Nebraska statute to determine whether it created an "expectancy of release" that entitled the inmates to constitutional protection. *Id.* at 12.

This approach evolved from the Court's earlier decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974). There, the Court held that a prisoner's interest in earning good-time credits was one of "real substance" because the credits affected the length of the inmate's term and, under the statute, the mandatory credits could be forfeited only for serious misbehavior. *Id.* at 477-78. *Wolff* focused not only on the statutes, but on the nature of the interest involved.

Four years after *Greenholtz*, the test further evolved when the Court held that states could create a liberty interest by "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates." *Hewitt v. Helms*, 459 U.S. 460, 472 (1983), *overruled in part by Sandin*, 515 U.S. 472. That is, the court focused not on the actual substance of the right, but on whether directory statutory language governed official decision-making and mandated the outcome to be reached upon a finding that the relevant criteria had been met. *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 462 (1989).

The last time the Court addressed liberty interests in the parole context was *Board of Pardons v. Allen*, 482 U.S. 369 (1987). In *Allen*, the Court held that a Montana parole statute, which required the parole board to release a prisoner subject to certain restrictions, created a liberty interest because the statute's language created a presumption of parole. *Id.* at 377-78.

The analysis used in *Greenholtz*, *Hewitt*, and *Allen* remained the law until *Sandin* was decided. The Court in *Sandin* criticized the path that the liberty-interest analysis had taken, finding that it had strayed from its constitutional moorings. *Sandin*, 515 U.S. at 477-84. That departure was undesirable for two reasons. First, it created a disincentive for states to codify regulations and procedures to provide uniform treatment. *Id.* at 482. And second, it led to the involvement of federal courts in the day-to-day management of state prisons, an approach that the Court has disapproved on numerous occasions. *Id.* at 482-83.

The *Sandin* Court refocused the analysis on the nature of the interest deprived, and held that such constitutionally protected interests "will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due

Process Clause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484.

B. The Issue Is Unresolved and Has Continuing National Impact on an Integral State Function.

Although *Sandin* plainly abandoned the language-based analysis employed in *Greenholtz* and *Allen*, the Court did not overrule its holdings in those parole cases. Since *Sandin*, the Court has not directly addressed *Sandin*'s applicability in parole cases. Some circuit courts have interpreted the Court's actions as a complete abandonment of language-based rights analysis. Others have interpreted its actions as retaining language-based rights analysis in the special context of parole. Two of this Court's post-*Sandin* cases have touched on the issue but have not directly addressed the source of the circuits' confusion.

In the first case, *Young v. Harper*, 520 U.S. 143 (1997), the sole issue was whether Oklahoma's pre-parole program was more like parole or minimum-security incarceration, and, thus, whether continued participation was protected by the Fourteenth Amendment. The Court held that, because Oklahoma's pre-parole program was equivalent to parole, it was entitled to due-process protection. *Id.* at 152-53. In so holding, the Court focused on the nature of the deprivation and the pre-releasee's continuing interest in liberty as it had done earlier in *Morrissey v. Brewer*, 408 U.S. 471 (1972).

In the second post-*Sandin* case, *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the Court concluded that clemency proceedings did not implicate a liberty interest. In a plurality opinion, the Court found that there was no substantive expectation of clemency under Ohio's statutes and that, under *Sandin*, the availability of clemency and the state's procedures for it did not "impose 'atypical and significant

hardship on the inmate in relation to the ordinary incidents of prison life.'" *Woodard*, 523 U.S. at 282-83 (quoting *Sandin*, 515 U.S. at 484). Thus, whether *Sandin* applies in parole cases remains unsettled because neither *Young* nor *Woodard* has provided explicit guidance to the circuits on the direction they should take.

Yet the circuits need direction, not only because they are split, but because how due-process rights are determined affects the functioning of every state's parole system. The reasons for abandoning the pre-*Sandin* methodology in prison cases have equal weight in the parole setting.

First, parole can serve many beneficial purposes and states should not feel constrained in their ability to enact parole-related laws and regulations that are sufficiently directory to ensure uniform application, but are not intended to convey an expectation of liberty. The *Sandin* methodology accords the states due deference to run core state functions, such as their criminal justice systems, without fear that state laws will trigger federal due-process protections where none are owed or intended.

Second, would-be parolees are still prisoners and have not been granted even conditional liberty. That is, they are serving term-to-life sentences and receive periodic parole-consideration hearings. There is no reason that the due-process test for prisoners at parole-consideration hearings should be any different than the test applied to prisoners at disciplinary hearings, or a host of other prison-related proceedings. Under the approach used by the Seventh, Ninth, and District of Columbia Circuits, the same prisoner facing a disciplinary proceeding one day and a parole-consideration hearing the next, would have two different due-process analyses applied to his proceedings. By focusing on the interest at stake, rather than the

state statutes or the type of proceeding, the *Sandin* approach leads to a uniform application of federal due-process principles.

And finally, this Court has repeatedly disapproved federal courts' micro-management of states' criminal-justice systems, most recently in *Garner v. Jones*, where the Court observed that "[t]he States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." *Garner v. Jones*, 529 U.S. 244, 252 (2000); *see also California Dep't of Corrections v. Morales*, 514 U.S. 499, 508 (1995) (disapproving approach that urged federal micro-management of state adjustments to parole and sentencing procedures); *Harris v. Alabama*, 513 U.S. 504, 512 (1995) (micro-management tasks properly rest within state's discretion to administer its criminal-justice system). By turning the focus away from language-based analysis and resetting the courts' sights on the liberty interest at stake, the *Sandin* approach respects federalism and allows states to manage their prison and parole systems without excessive and unnecessary federal oversight while still protecting federal due process.

The circuits' splintering decisions show that *Sandin*'s rational approach to liberty issues has not had the same beneficial effects in the area of parole as it has in the area of prison administration. Few things are more integral to the orderly functioning of a state's government than the administration of its criminal justice system. Whether *Greenholtz* or *Sandin* applies to parole issues is a significant issue deserving the Court's attention because it affects a core state function, it involves issues of federalism, and it will provide for uniform application of due process. This petition should be granted to resolve this important, but unsettled, constitutional issue.

II.

THE COURT SHOULD RESOLVE THE CLEAR SPLIT IN THE CIRCUITS OVER WHETHER THE *SANDIN* OR *GREENHOLTZ* TEST APPLIES TO DETERMINE THE EXISTENCE OF STATE-CREATED LIBERTY INTERESTS IN STATE PAROLE PROCEEDINGS.

The circuits have fractured in their approach to state-created liberty interests. Of the seven circuits that have addressed the issue post-*Sandin*, three have followed *Sandin*, three have clung to *Greenholtz*, and one has straddled the divide by applying a combination of the two tests. The need for uniformity in this important area is great, and, given the depth of the fissure, not likely to be resolved by the circuits.

The First Circuit confronted the issue in a parole case decided shortly after *Sandin*. *Hamm v. Latessa*, 72 F.3d 947 (1st Cir. 1995). In reversing the district court's reliance upon *Greenholtz*, *Hewitt*, and *Allen*, the court of appeals stated that, "the tectonic plates have shifted," that is, that *Sandin* worked a fundamental change in the analytical framework for liberty interests. *Id.* at 954. The court therefore applied *Sandin* to the case before it. *Id.* In doing so, the *Hamm* court recognized that "parsing the state law to determine its substance is not within the primary domain of a federal habeas court." *Id.* The First Circuit also later applied *Sandin* to a conditional-release case. *Dominique v. Weld*, 73 F.3d 1156 (1st Cir. 1996). The *Dominique* Court held that returning an inmate to confinement from a work-release program was not a significant or atypical deprivation and thus did not implicate due-process rights. *Id.* at 1160.

The two other circuits following the *Sandin* methodology, the Third and the Eighth Circuits, have done so in conditional-release cases. The Eighth Circuit held that returning an inmate to prison from Iowa's work-release program did not violate his due-process rights because it was not an atypical deprivation. *Callendar v. Sioux City Residential Treatment Facility*, 88 F.3d 666, 669 (8th Cir. 1996), (citing *Dominique*, 73 F.3d 1156 (1st Cir. 1996)). Likewise, the Third Circuit found that removing an inmate from New Jersey's community-release program and returning him to prison did not violate his rights because having to serve time in prison, as opposed to a half-way house, was what an inmate should expect from his prison sentence. *Asquinth v. Dep't of Corrections*, 186 F.3d 407, 412 (3rd Cir. 1999). *Asquinth* distinguished the Court's holding in *Young v. Harper* because, unlike the Oklahoma program in *Young*, New Jersey's inmates never left "institutional confinement." *Asquinth*, 186 F.3d at 411.

At the other end of the spectrum, the three circuits that have adhered to the mandatory-language analysis from *Greenholtz*, *Allen*, and *Hewitt* all seem to rest their reliance on a footnote in *Sandin* that stated that the new liberty test did not "technically require us to overrule any holdings of this Court." *Sandin*, 515 U.S. at 484 n.5. The only circuit of the three to devote any analysis to the matter was the District of Columbia Circuit, in *Ellis v. District of Columbia*, 84 F.3d 1413, 1418 (D.C. Cir. 1996). There, a group of prisoners sued over parole-eligibility and parole-revocation procedures. The court found that the *Sandin* test relates only to claims involving the day-to-day management of prisons and is ill-fitted to parole-eligibility determinations. *Id.* The court recognized that, while *Sandin* abandoned the reasoning of *Greenholtz* and *Allen*, it did not technically overrule them, and the *Ellis* court felt compelled to follow the old method: "Until the Court instructs us otherwise, we must follow *Greenholtz* and *Allen* because, unlike *Sandin*, they are directly on point." *Id.*

The Seventh Circuit felt equally bound by *Greenholtz* in a post-*Sandin* case brought by prisoners who were denied parole. *Heidelberg v. Ill. Prisoner Rev. Bd.*, 163 F.3d 1025 (7th Cir. 1998). The *Heidelberg* court found that although *Sandin* "criticize[d] the mandatory-discretionary dichotomy used in *Greenholtz* and *Allen*, it explicitly declined to overrule any previous case." *Id.* at 1026 n.1. Likewise, in this case, the Ninth Circuit relied on *Ellis* and declined to follow *Sandin* until the Court speaks more directly to the issue. *Armstrong v. Davis*, 275 F.3d 849, 864 (9th Cir. 2001).

That brings us to the Fifth Circuit, which has fashioned an amalgam of the two tests. Shortly after *Sandin*, the Fifth Circuit decided *Orellana v. Kyle*, 65 F.3d 29 (5th Cir. 1995), which challenged Texas's allegedly unconstitutional parole-review and reconsideration procedures. The court first discussed *Sandin* but then went on to explain that there was no due-process violation because the Texas statutes had previously been held to confer no liberty interest under the *Greenholtz-Allen* analysis. *Id.* at 32 (citing *Creel v. Keene*, 928 F.2d 707, 712 (5th Cir. 1991) (using *Greenholtz-Allen* analysis)). Similarly, in *Thompson v. Cockrell*, the court held that the Due Process Clause conferred no liberty interest in "calendar time" credits after an erroneous release on parole, but that Texas statutes did. *Thompson v. Cockrell*, 263 F.3d 423, 426-27 (5th Cir. 2001).

Illustrative of state courts' confusion is *In re Rosenkrantz*, in which a California appellate court found a protected liberty interest in parole proceedings by using the *Greenholtz-Allen* mandatory-language analysis, yet also cited *Sandin* as supporting its holding. *In re Rosenkrantz*, 116 Cal. Rptr. 2d 69, 80 (2002), *pet. review filed* Feb. 27, 2002.

The circuits are in disarray on their approaches to examining state-created liberty interests. Two of the circuits, including the one from which we petition, have explicitly said

they cannot follow *Sandin* without guidance from the Court. Guidance from the Court also would assist lawmakers of the states in understanding the appropriate principles that inform the laws and regulations of the criminal-justice systems. This is an issue of great significance on which the states need guidance.

CONCLUSION

Because this petition presents an issue of national importance, core to the functioning of the states' penal systems, on which the circuits are rent and to which this Court has not directly spoken, the petition for writ of certiorari should be granted.

Dated: April 3, 2002

Respectfully submitted,

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